

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

11 UNITED STATES OF AMERICA,) 2:06-cr-00310-HDM-PAL
12) 2:12-cv-00851-HDM
13 Plaintiff/Respondent,)
vs.) ORDER
14 JOSEPH HALL,)
15)
Defendant/Petitioner.)

17 Before the court is defendant Joseph Hall's ("Hall") motion to
18 vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255
19 (#237). The government has responded (#257), and Hall has replied
20 (#264). Hall has also filed a supplement to his petition (#280),
21 to which the government has responded (#284), and Hall has replied
22 (#285).

23 | Factual History

24 The following evidence was adduced at the trial of this
25 matter.

On August 15, 2006, a confidential informant ("CI") working with undercover officer Eric Calhoun ("Calhoun") arranged over the phone, in Calhoun's presence, to buy from Hall three ounces of

1 cocaine for \$1,500.00. (Trial Tr. 35-36, 53-56). After changing
2 the exchange location multiple times (Trial Tr. 45-46, 48, 50-51,
3 53), Hall called the CI and said he left the cocaine at 725
4 Wardelle Street, Las Vegas, NV - the house of the CI's girlfriend.
5 (Trial Tr. 53). The CI and Calhoun went to 725 Wardelle, and while
6 Calhoun waited outside, the CI went inside and returned with three
7 ounces of cocaine. (Trial Tr. 55-56). Calhoun and the CI then
8 waited outside of 725 Wardelle for Hall. (Trial Tr. 60). Hall
9 arrived wearing a hat that was blue in the back and white with a
10 blue A in the front. (Trial Tr. 66; Trial Ex. 6). Calhoun
11 observed the CI give Hall \$1,500.00. (Trial Tr. 61-62). The men
12 then discussed future drug transactions, and Hall gave Calhoun
13 permission to contact him directly. (Trial Tr. 64). The
14 transaction was captured on video. (See Trial Tr. 56-58; Trial Ex.
15 6).

16 That same date, Hall was traced to the parking lot of Extended
17 Stay of America on 4240 Boulder Highway in Las Vegas. (Trial Tr.
18 170). On August 18, 2006, Las Vegas Metropolitan Police Department
19 ("LVMPD") detective Anton Gorup set up surveillance at the Extended
20 Stay. (Trial Tr. 171). Gorup eventually located Hall inside of
21 apartment 3201. (Trial Tr. 172).

22 On August 22, 2006, Hall agreed over the phone to sell Calhoun
23 "the same thing" - three more ounces of crack cocaine for \$1,500.
24 (Trial Tr. 38, 73, 77). Later that day, Calhoun and Hall met at
25 725 Wardelle and consummated the transaction. (Trial Tr. 78, 88).

26 The same day, Gorup conducted surveillance of apartment 3201.
27 (Trial Tr. 158, 172-73). During that time, Gorup observed a woman
28 enter and exit the apartment several times; each time she returned,

1 she knocked to reenter. (Trial Tr. 174). Gorup also observed Hall
2 leave the apartment multiple times; each time Hall returned, he
3 used a key to reenter. (Trial Tr. 174-76).

4 On August 23, 2006, Gorup returned to execute a search warrant
5 of apartment 3201. Before going in, he observed Hall and two women
6 leave the apartment. (Trial Tr. 179-80). The three were taken
7 into custody in the parking lot, and the search warrant was then
8 executed. (Trial Tr. 180). Inside were found two glass measuring
9 cups, a silver spoon and a digital scale with white residue,
10 sandwich baggies, and two bags hidden in a couch, one containing
11 cash and the other containing individually wrapped one-ounce pieces
12 of crack cocaine. (Trial Tr. 183, 185-86). In addition, the
13 detectives found large men's shoes, large men's blue jeans, and a
14 blue and white hat with an A on the front like the one Hall had
15 been seen wearing. (Trial Tr. 186-87). Gorup also testified that
16 detectives recovered miscellaneous paper work in Hall's name.
17 (Trial Tr. 190; Trial Ex. 13). In total, detectives found
18 \$6,822.00 in the apartment. Based on the serial numbers, they were
19 able to determine that \$220.00 of the \$6,822.00 were bills Calhoun
20 had given Hall to purchase cocaine. (Trial Tr. 188-89).

21 On Hall's person when he was arrested was the cell phone the
22 CI and Calhoun had called to arrange the drug transactions. (Trial
23 Tr. 190).

24 Apartment 3201 had been rented in the name of "something
25 similar" to "Mary Kershon" and paid for in cash. (Trial Tr. 211,
26 220). In Gorup's experience and training, persons engaged in
27 criminal activity usually do not put rentals in their own names in
28 order to avoid detection. (Trial Tr. 220).

1 **Procedural History**

2 On August 29, 2006, the grand jury returned an indictment
3 against Hall charging him with three counts of possession with
4 intent to distribute and distribution of a controlled substance:
5 Count 1 for the August 15, 2006, incident, Count 2 for the August
6 22, 2006, incident, and Count 3 related to the August 23, 2006,
7 search of apartment 3201. (Doc. #1). Michael Sanft was appointed
8 to represent Hall. (Doc. #4).

9 On March 5, 2007, just before trial was set to begin, Hall
10 raised concerns about Sanft's representation. (Doc. #169). The
11 court relieved Sanft as counsel and ordered the Federal Public
12 Defender's Office be appointed to represent Hall. (*Id.*) Trial was
13 reset for a later date. (*Id.*)

14 On December 12, 2007, just before trial was set to begin for
15 the second time, the Public Defender's Office was relieved as
16 counsel, Jacqueline Naylor was appointed to represent Hall, and
17 trial was reset for a later date. (Doc. #79 & #80).

18 On March 19, 2008, Hall filed a letter with the court again
19 expressing concern about his representation by all attorneys,
20 including Naylor. (Doc. #85). On April 2, 2008, Hall retained G.
21 Luke Ciciliano. (Doc. #91). The court granted Hall's motion for
22 substitution of counsel. (Doc. #92).

23 On May 1, 2008, Ciciliano filed a motion to suppress all
24 evidence seized on August 23, 2006. (Doc. #98). Ciciliano argued
25 that the search warrant obtained by Officer Gorup lacked probable
26 cause because it implied the August 15, 2006, transaction took
27 place at apartment 3201, alleged to be Hall's residence, when it
28 actually took place at 725 Wardelle. See *id.* Following

1 evidentiary hearings on May 13, 2008, and June 6, 2008, the court
2 denied the motion. (Doc. #104 & #110).

3 Trial commenced on June 11, 2008. On June 12, 2008, the jury
4 returned guilty verdicts on all three counts. (Doc. #117). The
5 jury found that each count involved 50 grams or more of a mixture
6 or substance containing a detectable amount of cocaine base. *Id.*

7 Following trial, Ciciliano filed a motion to withdraw as
8 counsel. (Doc. # 122). On that same date, Hall filed a *pro se*
9 motion for new trial. (Doc. #123). The court granted the motion
10 to withdraw and appointed Todd Leventhal to represent Hall. (Doc.
11 #128 & #129). The court gave Leventhal two weeks to review and
12 file any supplements to Hall's motion for new trial. (Doc. #129).
13 Leventhal did not file any supplement. On October 23, 2008, the
14 court denied Hall's motion, holding in relevant part:

15 [T]he defendant's primary contention is that he received
16 ineffective assistance of counsel. As to matters that
17 occurred at trial the court concludes that the defendant
18 has failed to establish that his counsel's representation
19 fell below an objective standard of reasonableness. As
claims should be raised on collateral review under . . .
§ 2255.

20 (Doc. #137).

21 On January 8, 2009, the court granted Hall's request to
22 represent himself at sentencing and appointed Leventhal as standby
23 counsel. (Doc. #141). On May 14, 2009, the court sentenced Hall
24 to three concurrent terms of life imprisonment pursuant to 21
25 U.S.C. § 841 and the career offender provisions of the United
26 States Sentencing Guidelines. (Doc. #161 & 164).

27 Hall appealed his conviction on Count 3 of the indictment and
28 his sentence on all three counts. Mario Valencia was appointed to

1 represent Hall on appeal. (Doc. #163). On November 10, 2010, the
2 Ninth Circuit affirmed the court's sentence and judgment of
3 conviction. (Doc. #228).

4 On May 14, 2012, Hall timely filed the instant motion pursuant
5 to 28 U.S.C. § 2255. Although Hall filed his reply on February 25,
6 2013, Hall requested the court hold in abeyance its decision on his
7 petition pending its rulings on motions for discovery and for leave
8 to supplement. (Doc. #262, #264). In addition, Hall's reply
9 contained new arguments, one of which the court determined there
10 was good cause to consider: Hall's claim that Ciciliano rendered
11 ineffective assistance of counsel by failing to sufficiently
12 discuss the government's plea offer with him before trial. On
13 April 15, 2013, the court ordered the government to respond to that
14 argument. (Doc. #272). The government filed its response on April
15 24, 2013. (Doc. #275).

16 On April 18, 2013, the court granted in part and denied in
17 part Hall's motion for discovery. (Doc. #274). The court directed
18 the government and Hall's former attorneys to provide Hall with
19 certain documents on or before May 20, 2013, including the proposed
20 plea agreement in effect when Hall went to trial. (*Id.*) Following
21 that deadline, the court ordered Hall to file any request to
22 supplement his § 2255 motion on or before June 21, 2013. (Doc.
23 #277).

24 On June 14, 2013, Hall filed a motion asserting that the
25 government had not yet produced the proposed plea agreement. On
26 June 17, 2013, the government filed with the court and served on
27 Hall the plea offer that was in effect at the time Hall went to
28 trial. (Doc. #281).

1 Hall also filed a motion to amend his § 2255 petition, along
2 with the proposed supplement. (Doc. #278 & #280). The court
3 granted Hall leave to amend. The government timely filed a
4 response to the supplement, and Hall has replied. The matter now
5 stands submitted.

6 **Standard**

7 A convicted defendant may move to vacate, set aside, or
8 correct his sentence pursuant to 28 U.S.C. § 2255, if: (1) the
9 sentence was imposed in violation of the Constitution or laws of
10 the United States; (2) the court was without jurisdiction to impose
11 the sentence; (3) the sentence was in excess of the maximum
12 authorized by law; or (4) the sentence is otherwise subject to
13 collateral attack. *Id.* § 2255(a); see also *United States v. Berry*,
14 624 F.3d 1031, 1038 (9th Cir. 2010).

15 **Analysis**

16 **I. Ineffective Assistance of Counsel - Trial Counsel Ciciliano**

17 Ineffective assistance of counsel is a cognizable claim under
18 § 2255. *Baumann v. United States*, 692 F.2d 565, 581 (9th Cir.
19 1982). In order to prevail on a such a claim, Hall must satisfy a
20 two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687
21 (1984). First, Hall must show that his counsel's performance fell
22 below an objective standard of reasonableness. *Id.* at 687-88.
23 "Review of counsel's performance is highly deferential and there is
24 a strong presumption that counsel's conduct fell within the wide
25 range of reasonable representation." *United States v. Ferreira-*
26 *Alameda*, 815 F.2d 1251, 1253 (9th Cir. 1986). Second, Hall must
27 show that the deficient performance prejudiced his defense.
28 *Strickland*, 466 U.S. at 687. This requires showing that "there is

1 a reasonable probability that, but for counsel's unprofessional
2 errors, the result of the proceeding would have been different. A
3 reasonable probability is a probability sufficient to undermine
4 confidence in the outcome." *Id.* at 694. "It is not enough to show
5 that the errors had some conceivable effect on the outcome of the
6 proceeding. Counsel's errors must be so serious as to deprive the
7 defendant of a fair trial, a trial whose result is reliable."
8 *Harrington v. Richter*, - U.S. -, 131 S. Ct. 770, 787-88 (2011)
9 (internal citations and punctuation omitted).

10 As an initial matter, Hall argues that he is not required to
11 demonstrate prejudice in connection with any of his ineffective
12 assistance claims as Ciciliano was effectively "completely missing"
13 from his trial. *United States v. Cronic*, 466 U.S. 648 (1989). The
14 court finds this contention to be without merit. Ciciliano was
15 present at trial and advocated on Hall's behalf.

16 Hall argues Ciciliano rendered ineffective assistance by: (1)
17 striking all minority jurors; (2) failing to investigate and call
18 exculpatory witnesses; (3) failing to object to the lack of
19 testimony from the CI; (4) failing to object to Hall's shackles and
20 the seating arrangement; (5) failing to request a "missing witness"
21 instruction; (6) failing to investigate the facts and law of the
22 case; (7) improperly referring to the nickname "Pussylips" during
23 his closing statement; (8) failing to secure an "aiding and
24 abetting" instruction; and (9) failing to provide and discuss the
25 government's proposed plea offer with Hall before trial.¹

26

27 ¹ Hall raises several new arguments in his reply, which with the one
exception noted above the court declines to consider. See *Zamani v. Carnes*,
28 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider
arguments raised for the first time in a reply brief.").

1 A. Striking of Minority Jurors

2 Hall argues that Ciciliano struck all minority jurors from the
3 jury panel in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).
4 The government argues that Hall cannot raise a *Batson* challenge to
5 his own counsel's actions, and that even if he could, Ciciliano's
6 affidavit states that he struck the jurors based on race-neutral
7 reasons. (See Doc. #257 (Gov't Opp'n (Ciciliano Aff. ¶ 11))).

8 Hall's argument is unusual in that he is not challenging
9 another party's use of peremptory strikes. And as the government
10 correctly points out, none of the cases Hall cites involve a
11 challenge by a defendant to his own attorney's conduct. See
12 *Georgia v. McCollum*, 505 U.S. 42 (1992) (challenge by prosecutors
13 to defendants' racially based peremptory strikes); *United States v.*
14 *Huey*, 76 F.3d 638 (5th Cir. 1996) (challenge by defendant to co-
15 defendant's use of racially based peremptory strikes); *Walters v.*
16 *Mitchell*, 2002 U.S. Dist. LEXIS 13666 (E.D.N.Y. 2002) (defendant
17 argued the trial court erred in finding two of his peremptory
18 strikes were racially motivated).

19 Even if Hall were able to challenge his own counsel's actions
20 on collateral review, Hall did not raise any *Batson* challenge at
21 his trial, and "an objection at trial is a prerequisite to a *Batson*
22 challenge for purposes of habeas review." *Haney v. Adams*, 641 F.3d
23 1168, 1173 (9th Cir. 2011). In *Haney*, the Ninth Circuit explained
24 that the Supreme Court's *Batson* procedure "presupposes . . . a
25 timely objection to the challenges during voir dire," and the
26 determinations that must be made by the court in conducting a
27 *Batson* analysis would be "difficult, if not impossible, to evaluate
28 for the first time in post-conviction proceedings when no record is

1 preserved." *Id.* at 1172. While *Haney* involved a state habeas
2 petition challenging the prosecutor's use of peremptory strikes, as
3 opposed to a federal petition challenging defense counsel's
4 actions, the court finds that neither of these factors is
5 dispositive. The reason for requiring a contemporaneous *Batson*
6 objection in order to preserve the claim for collateral review
7 applies with equal force to this case. The record amply reflects
8 that Hall frequently raised issues on his own, including a *pro se*
9 motion for a new trial (#123 & #150) that did not contain any
10 *Batson* argument. The absence of a contemporaneous objection bars a
11 defendant's *Batson* challenge on collateral review.² Accordingly,
12 under *Haney v. Adams*, Hall's *Batson* challenge must fail.

13 B. Failure to Investigate and Call Exculpatory Witnesses

14 An attorney is ineffective for failing to introduce evidence
15 demonstrating his client's factual innocence or evidence that
16 "raises sufficient doubt as to that question to undermine
17 confidence in the verdict." *Avila v. Galaza*, 297 F.3d 911, 919
18 (9th Cir. 2002). An attorney is also ineffective if he fails "to
19 conduct a reasonable investigation" or to "make a showing of
20 strategic reasons for failing to do so." *Sanders v. Ratelle*, 21
21 F.3d 1446, 1456 (9th Cir. 1994).

22 Hall argues that Ciciliano failed to investigate and call
23 several exculpatory witnesses: (1) Mary Kirkhom; (2) Lavot
24 McDaniel; (3) Ebony Cook; (4) LeKrystal Cardenas; (5) Mike Edwards;
25 (6) Dalichia Finks; (7) Courtney White; (8) Ronisha White; and (9)

27 ² There is no merit to Hall's contention that when the government said
28 it was not raising a *Batson* challenge, it effectively raised such a
challenge.

1 Glen Meeks. The government argues that Ciciliano tried to contact
2 several of the above-named witnesses "on numerous occasions" by
3 telephone but could not reach them and Hall could not give him
4 their physical addresses. (Gov't Opp'n (Ciciliano Aff. ¶¶ 4, 5 &
5 7)). The government further argues that even if the witnesses were
6 available and willing to testify, Ciciliano was not deficient for
7 failing to call them to offer likely perjured testimony in light of
8 the overwhelming evidence of Hall's guilt. Hall replies that he
9 did give Ciciliano the witnesses' contact information and that
10 Ciciliano has not provided any notes or documents to prove that he
11 investigated the case. Hall attaches to his reply a number of
12 documents showing addresses for several of the witnesses.

13 Without deciding whether Ciciliano could have located the
14 witnesses, Hall has failed to establish that the failure to call
15 any one of them prejudiced his defense.

16 i. Mary Kirkhom

17 Kirkhom's affidavit states that she would have testified that
18 the clothes and papers found in apartment 3201 and depicted in the
19 photographs introduced at trial were not Hall's, that she and not
20 Hall rented out apartment 3201, and that Hall did not occupy
21 apartment 3201 or ever have a key to it.³ (Def. Mot. App'x 1
22 (Kirhom Aff.)).

23 Kirkhom's testimony would not have demonstrated Hall's factual
24 innocence or raised doubt as to his guilt. Regardless of who
25 rented the apartment, abundant evidence demonstrated that Hall had
26

27 ³ Hall asserts that Kirkhom would have testified that the drugs found
28 in 3201 were not his and that another male resided in apartment 3201 with
herself and Cardenas. Kirkhom's affidavit contains no such statements.

1 access to it. Gorup observed the man he later identified in court
2 as Hall exiting and entering the apartment with a key several
3 times. Kirkhom's assertion that Hall never had a key to the
4 apartment does not disprove this, as Kirkhom admits that two keys
5 existed and, although she says she gave the other key to Cardenas,
6 she does not state that she was at all times aware of who had or
7 was using the other key. Further, regardless of whose clothes and
8 papers were found in the apartment, there was sufficient other
9 evidence collected traceable to Hall, including \$220 of the cash
10 given to Hall during the August 22, 2006, transaction. Finally, to
11 the extent Kirkhom's testimony was intended to suggest that Hall
12 had no access or connection to apartment 3201, such a suggestion is
13 implausible in light of the fact Hall was arrested in the parking
14 lot after exiting the apartment, and was observed exiting and
15 entering it with a key. Thus even if the jury had heard Kirkhom's
16 testimony, there is no reasonable probability that its verdict
17 would have been any different.

18 ii. Lavot McDaniel

19 In his affidavit, McDaniel states that he would have testified
20 that he and Kirkhom resided in apartment 3201, that Hall was not
21 staying in the apartment and never possessed a key thereto, that
22 the clothes, papers, hats, and \$1,600 of the cash found therein
23 were his, and that none of the drugs, money, or other items found
24 in the apartment belonged to Hall. (Def. Mot. App'x 2 (McDaniel
25 Aff.)).⁴

26

27 ⁴ Hall also asserts McDaniel would have testified that the "utensil"
28 found in apartment 3201 and depicted in a photograph introduced at trial was
his own, but the affidavit contains no such statement.

1 McDaniel does not identify to whom the drugs and paraphernalia
2 that were confiscated from apartment 3201 belonged. Had he
3 testified, McDaniel doubtless would have been asked that question.
4 Whatever his answer, McDaniel would have either inculpated himself,
5 Kirkhom, or Cardenas - the other persons allegedly residing in and
6 having control of the apartment - or, had he testified he did not
7 know, the testimony would have been palpably incredible.

8 More importantly, however, Ciciliano attests that he tried to
9 contact McDaniel but could not locate him. McDaniel, while saying
10 that he would have testified and that he was never contacted by any
11 of Hall's attorneys, does not state that he could have been
12 contacted or that he was available to testify at the trial.
13 Neither Hall nor McDaniel provides any information proving, or even
14 suggesting, that Ciciliano could have reached McDaniel at the time
15 of trial. Ciciliano could not be ineffective for failing to call a
16 witness he was unable to locate. Hall has therefore failed to
17 establish either deficient performance or prejudice with respect to
18 McDaniel's potential testimony.

19 iii. Ebony Cook

20 Hall argues that Cook also would have testified that Hall did
21 not live or sleep in apartment 3201, did not have a key to the
22 apartment, and did not own the drugs located in the apartment.
23 Cook's affidavit does not say anything about whether the drugs were
24 Hall's, but she does say that she was visiting Cardenas on August
25 23, 2006, when they and Hall were detained in the parking lot. She
26 goes on to say that Hall did not have a key to 3201, that Cardenas
27 had the key that was confiscated, and that Hall was not an occupant
28 of 3201 between August 18, 2006, and August 23, 2006. However,

1 Cook does not state how she knows any of these things, especially
2 if, as she says, she was merely visiting Cardenas on August 23,
3 2006, and not staying herself in 3201. (See Def. Mot. App'x 3
4 (Cook Aff.)). Cook further says that after the raid she helped
5 Cardenas and Kirkhom pack up the apartment and that nothing they
6 packed belonged to Hall. The basis of such knowledge is again
7 unclear. Regardless, this testimony is not reasonably likely to
8 have changed the jury's verdict given the abundant other evidence
9 tying defendant to apartment 3201, including eyewitness
10 identification and \$220 of the buy money. Finally, Cook states
11 that she saw Hall in Compton and Los Angeles between August 18,
12 2006, through August 21, 2006. *Id.* However, this testimony would
13 prove nothing, as it was not impossible for Hall to have been in
14 both places on those dates. See *infra* § I.F.4-5.

15 v. Remaining witnesses

16 Hall has not provided any evidence as to what testimony the
17 remaining witnesses - Cardenas, Edwards, Finks, Courtney White,
18 Ronisha White, and Glen Meeks - would have given. There are no
19 affidavits from these individuals on the record. Further, the
20 court notes that Hall asserts several of these witnesses should
21 have been called to testify that Hall did not deliver drugs to 725
22 Wardelle on August 15, 2006. However, the lack of any such
23 testimony was not prejudicial. Ciciliano argued to the jury that
24 no one saw Hall leave the drugs in 725 Wardelle and argued that the
25 CI had been convicted of selling drugs. (See Trial Tr. 32).
26 Moreover, no one argued or testified that Hall was observed
27 delivering the drugs; rather, the evidence that he did so was
28 Hall's own words, captured on audio recording. (Trial Tr. 53).

1 The court notes specifically with respect to Mr. Meeks that
2 Hall does not identify what exculpatory information Mr. Meeks would
3 have provided other than the identity of some of the witnesses Hall
4 wanted called. For the same reasons that the failure to call these
5 witnesses was not deficient, the failure to call Meeks to the stand
6 was also not deficient.

7 Accordingly, Hall has failed to support his claim that these
8 witnesses would have provided exculpatory evidence at his trial.
9 The court cannot conclude that the failure to call these witnesses
10 prejudiced Hall's defense.

11 C. Failure to Object to Lack of Testimony from Informant

12 Hall argues that the government's case was based on
13 information obtained from the CI and that Ciciliano therefore
14 violated his Sixth Amendment Confrontation Clause rights when he
15 did not object to the CI's absence at trial. The government
16 responds that as the CI's out-of-court statements presented during
17 trial were admitted to provide context, not for their truth, Hall's
18 Sixth Amendment rights were not violated.

19 The Confrontation Clause bars admission of out-of-court
20 testimonial statements unless the witness is unavailable and the
21 defendant had a prior opportunity to examine him or her. *Davis v.*
22 *Washington*, 547 U.S. 813, 823, (2006). The Confrontation "Clause
23 does not bar the use of testimonial statements for purposes other
24 than establishing the truth of the matter asserted." *Crawford v.*
25 *Washington*, 541 U.S. 36, 59 n.9 (2004); see also *United States v.*
26 *Le*, 172 F. App'x 208, 210 (9th Cir. 2006) (unpublished disposition)
27 (CI's statements did not violate the Clause because they were
28 introduced to provide context, not to prove the truth of their

1 content); *United States v. Eppolito*, 646 F. Supp. 2d 1239, 1241 (D.
2 Nev. 2009). The CI's statements in this case were not offered for
3 the truth of the matter asserted but rather to provide context to
4 the conversations between the CI, Calhoun, and Hall. The court
5 specifically advised the jury it could not consider the CI's
6 statements for their truth. (Trial Tr. 50, 55). Moreover, it is
7 doubtful that any of the CI's statements were testimonial in
8 nature, as they were uttered to facilitate the controlled buys and
9 not as "solemn declaration[s] or affirmation[s] made for the
10 purpose of establishing or proving some fact." *Crawford*, 541 U.S.
11 at 51; see also *United States v. Solorio*, 669 F.3d 943, 952-54 (9th
12 Cir. 2012) cert. denied, 133 S. Ct. 109 (2012) (Confrontation
13 Clause not violated by admission of out-of-court statements of DEA
14 agents made while monitoring a drug bust as such statements, made
15 with the "primary purpose other than possible prosecutorial use,"
16 were nontestimonial). Accordingly, the admission of the CI's
17 statements at trial did not violate Hall's Confrontation Clause
18 rights. Ciciliano's failure to raise what would have amounted to a
19 nonmeritorious objection therefore was neither deficient nor caused
20 Hall any prejudice. *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir.
21 1985) ("Failure to raise a meritless argument does not constitute
22 ineffective assistance.").

23 To the extent Hall challenges the fact the CI was not a
24 witness at trial (even without the admission of his out-of-court
25 statements), Hall has cited no case holding that the government
26 must call every witness to a crime. The government was able to
27 prove its case against Hall without the CI's testimony, and it was
28 not required to call the CI to the stand. See *United States v.*

1 *Ramirez*, 714 F.3d 1134, 1137 (9th Cir. 2013) (recognizing that
2 government may have reasons for not calling a favorable witness).
3 In fact, the CI's testimony would have been largely cumulative of
4 Calhoun's, with the exception of his recovery of drugs from within
5 725 Wardelle. Such testimony would have been immaterial as Hall's
6 own words established that he had left the drugs inside. In
7 addition, Ciciliano was able to introduce impeaching information
8 about the CI even without his testimony. (Tr. 100, 211-14).
9 Accordingly, any objection to the CI's absence was without merit,
10 and the CI's absence did not prejudice Hall's case.

11 D. Failure to Object to Shackles and Seating Arrangement

12 Hall argues that he was visibly shackled and forced to sit
13 several chairs away from his attorneys. He asserts Ciciliano was
14 ineffective for failing to object to his shackles and the seating
15 arrangement.⁵

16 The Due Process Clause forbids the use of visible shackles
17 during a defendant's criminal trial absent an "'essential state
18 interest' - such as the interest in courtroom security-specific to

19

20 ⁵ It is unclear whether Hall is also suggesting that the presence of
21 security personnel violated his right to a fair trial. "The noticeable
22 deployment of security personnel in a courtroom during trial is not an
23 inherently prejudicial practice that requires justification by an essential
24 state interest specific to each trial. Rather, in light of the variety of
25 ways that security guards can be deployed, courts must determine prejudice
26 on a case-by-case basis. In federal habeas corpus proceedings, federal
27 courts reviewing the constitutionality of security personnel used at trial
28 must look at the scene presented to jurors and determine whether what they
 saw was so inherently prejudicial as to pose an unacceptable threat to
 defendant's right to a fair trial; if the challenged practice is not found
 inherently prejudicial and if the defendant fails to show actual prejudice,
 the inquiry is over." *Williams v. Woodford*, 384 F.3d 567, 588 (9th Cir.
 2004). To the extent Hall is making such an argument, the presence of a
 handful of security officers in the courtroom was not "so inherently
 prejudicial as to pose an unacceptable threat to defendant's right to a fair
 trial." Nor has Hall provided any evidence that he suffered actual
 prejudice from the presence of the security personnel.

1 the defendant on trial." *Deck v. Missouri*, 544 U.S. 622, 624, 626,
2 632 (2005). Hall argues that the court failed to make specific
3 findings as to why leg restraints were required in this case.
4 However, the reasons for restraints were clear from the record.
5 Moreover, the jury could not see Hall's leg restraints as the table
6 was dressed to hide them. (See Trial Tr. 2). There is no
7 evidence that the jury could see Hall's shackles despite the table
8 dressing. The declarations Hall provides contain the observations
9 of individuals sitting in the gallery, not of individuals sitting
10 in the jury box. (See Def. Mot. App'x 4-6). As the jury could not
11 see Hall's restraints, Hall cannot show any prejudice. See *Larson*
12 *v. Palmateer*, 515 F.3d 1057, 1062-63 (9th Cir. 2008); *United States*
13 *v. Howard*, 480 F.3d 1005, 1013 (9th Cir. 2007); *Williams v.*
14 *Woodford*, 384 F.3d 567, 592-93 (9th Cir. 2004). Further, Hall has
15 not demonstrated why or how his leg shackles prevented him from
16 communicating with his counsel. Therefore, Hall has not
17 established that being shackled prejudiced his case.⁶

18 As to the seating arrangement, Hall argues that he was not
19 next to his counsel and that he had to communicate with notes and
20 tapping on the table. Ciciliano, on the other hand, correctly
21 avers that Hall was seated next to him and was not at a separate
22 table. Hall's own diagram confirms that he was seated at the edge

23
24 ⁶ In his reply, Hall argues that the shackles prevented him from
25 participating in sidebar and testifying on his own behalf. Hall has not
26 established prejudice on either count. First, there were few sidebar
27 during Hall's trials, and Ciciliano consulted with Hall about each. (Trial
28 Tr. 156). Second, defendant chose not to testify and never informed the
court that he made that decision because he was shackled. Should Hall have
wanted to testify, arrangements would have been made that ensured the jury
could not see his restraints. Ultimately, Hall did not wish to testify, a
decision about which the court canvassed him extensively. (Trial Tr. 199-
201).

1 of counsel's table, and that he was near and able to communicate
2 with his attorneys. (See Doc. #264 Ex. D). Further, there is no
3 basis for concluding that Hall's position between two tables could
4 have unduly influenced the jury's perception of Hall such that it
5 tainted the verdict. Accordingly, Hall has not shown any prejudice
6 emanating from the seating arrangement, nor did Ciciliano's failure
7 to object to it fall below the standard of reasonable
8 representation.

9 E. Failure to Request a "Missing Witness" Instruction

10 Hall argues that because neither the CI nor his girlfriend
11 testified, and because they were the only ones who "observed what
12 happened during the alleged controlled buys" (Def. Mot. 26), his
13 attorney should have requested a "missing witness" instruction.
14 The government responds that a missing witness instruction is not
15 required if the witness is equally available to both parties, and
16 that Hall has not shown the witnesses were unavailable to him.
17 Further, the government argues, Ciciliano made a tactical decision
18 not to call the CI on the grounds that even with the CI's testimony
19 Hall would have been found guilty. (See Doc. #257 (Ciciliano Aff.
20 14)).

21 As an initial matter, Ciciliano did request a missing witness
22 instruction, although he did not make a formal objection when the
23 court declined to give it. (See Doc. #113). However, even absent
24 this, Hall has not established deficient performance.

25 "A missing witness instruction is appropriate if two
26 requirements are met: (1) [t]he party seeking the instruction must
27 show that the witness is peculiarly within the power of the other
28 party and (2) under the circumstances, an inference of unfavorable

1 testimony [against the non-moving party] from an absent witness is
2 a natural and reasonable one." *Ramirez*, 714 F.3d at 1137. Hall
3 has not demonstrated either. The CI was not "peculiarly within the
4 power of the" government, as Ciciliano was aware of the CI's
5 identity but made a tactical decision not to call him. Hall has
6 not shown the decision to not call the CI was an unreasonable
7 decision, particularly given that, in light of the CI's cooperation
8 with police, the CI's testimony was likely to have harmed, and not
9 helped, Hall's case. See *Johnson v. Tennis*, 2006 WL 4392562, at *8
10 (E.D. Pa. 2006) (holding that strategic decision not to call
11 uncooperative witnesses fell within trial counsel's discretion and
12 citing cases in support). Nor, for the same reason, do the
13 circumstances naturally and reasonably suggest the CI's testimony
14 would have been favorable to Hall. Further, while it is unclear
15 whether the CI's girlfriend was available to Hall, her testimony
16 was not necessary to the government's case, as Hall himself told
17 Calhoun and the CI that he had left the cocaine at 725 Wardelle.
18 (Trial Tr. 53, 71-72). Not only that, Hall has not proven that the
19 CI's girlfriend even had relevant testimony to provide. There is
20 thus no "natural and reasonable" inference that the CI's
21 girlfriend's testimony would have been unfavorable to the
22 government. Finally, Hall does not explain why - or present
23 evidence that - the lack of the CI's or his girlfriend's testimony
24 prejudiced his case. Ciciliano pointed out to the jury several
25 times that no one saw Hall leave the drugs in the house. (Trial
26 Tr. 94-99).

27 F. Failure to Investigate

28 Hall asserts that Ciciliano failed to sufficiently investigate

1 his case, and that if he had investigated he would have discovered:
2 (1) that paperwork photographed in apartment 3201 did not have
3 Hall's name on it; (2) that the hand-to-hand transaction between
4 Hall and Calhoun on August 22, 2006, had been recorded, contrary to
5 Calhoun's testimony that it had not; (3) that the hats recovered
6 from apartment 3201 belonged to Lavot McDaniel; (4) court records
7 from Compton in Hall's name dated on August 21, 2006; and (5) a
8 receipt with Hall's signature from California dated August 18,
9 2006.

10 1. Paperwork

11 At trial, Gorup testified that agents had recovered
12 miscellaneous paperwork in Hall's name from apartment 3201. The
13 paperwork was admitted as Exhibit 13. Hall argues that this
14 testimony was false because the paperwork in Exhibit 13 was
15 actually recovered from his car and not from the apartment, and
16 that paperwork in the apartment was in another's name: Lavot
17 McDaniel. Proof of this, Hall argues, is the fact that one of the
18 photographs taken during the search of apartment 3201 and admitted
19 during trial shows paperwork with McDaniel's name. Hall argues
20 that his attorney was ineffective for failing to notice this and to
21 use it to impeach Gorup's testimony that he found paperwork in
22 Hall's name in apartment 3201.

23 The government responds that while the photograph indeed has
24 paperwork in McDaniel's name, it never claimed that Hall was in
25 sole possession of the apartment.

26 As an initial matter, there is no evidence to support Hall's
27 contention that paperwork with his name on it was found only in his
28 car. In fact, Detective Gorup testified under oath that the

1 documents in Exhibit 13, which had Hall's name on them, had been
2 recovered from apartment 3201. (Trial Tr. 190).

3 Next, Hall's assertion that Ciciliano was ineffective for
4 failing to discover the discrepancy is without merit. First, there
5 is no reasonable probability the result would have been different
6 had Ciciliano attacked Gorup's credibility in this way. Testimony
7 at trial made it clear that Hall was not the only person who was
8 present in apartment 3201. Gorup did not testify that all
9 paperwork in apartment 3201 was in Hall's name. Further, paperwork
10 in McDaniel's name in the apartment does not foreclose that there
11 was also paperwork in Hall's name therein. Finally, Hall cannot
12 show that any failure prejudiced his defense on Count III,
13 particularly in light of the overwhelming evidence of his access to
14 apartment 3201.

15 2. Audio Recording

16 At trial, Calhoun testified that although he was wired for the
17 August 22, 2006, transaction, no audio was available from the time
18 he and Hall went inside 725 Wardelle. There was, however, audio
19 from earlier in the day, of Calhoun and Hall making arrangements
20 over the phone for another sale and of the CI and Hall confirming
21 the details of that transaction. (Trial Tr. 74-78, Exs. 7-A, 7-B-1,
22 7-B-2). Hall argues that Ciciliano should have impeached Calhoun
23 by challenging Calhoun's assertion because, he argues, a recording
24 of the transaction did exist. Hall asserts he obtained a copy of
25 the recording after trial and attaches as proof a photocopy of two
26 CDs. (#264 (Def. Reply Ex. F)). Hall has not submitted any copy
27 of the alleged recording to the court for verification. Nor has
28 Hall explained how and where he obtained a copy of a recording the

government claims did not exist.

Hall's evidence is not persuasive. First, the photocopies of the CDs contain nothing to indicate they are audio recordings of the August 22, 2006, transaction inside 725 Wardelle. Instead, one of the CDs has the date August 15, 2006, and the other has no date but reads "Calhoun/Gorup." The court cannot conclude on this basis that either CD contains audio from the August 22, 2006 transaction. Moreover, to the extent the second CD is from August 22, 2006, there is nothing to suggest it is different from the August 22, 2006, recordings admitted at trial. (Trial Tr. 74-78, Exs. 7-A, 7-B-1, 7-B-2). Finally, Hall provides no plausible basis for concluding that a recording of the transaction inside 725 Wardelle indeed exists: he has not stated where it came from or how he got it. If Hall obtained the recording from nongovernmental sources (i.e., he recorded the transaction) he certainly cannot fault his attorney for not having a copy. Nor would the copy of the recording have cast any doubt on the officer's testimony, because nothing suggests he was aware of the recording. For those reasons, Hall's claim that Ciciliano should have discovered a recording Hall has not proven exists is without merit.⁷ In addition, no evidentiary hearing is required to determine whether the recording exists as Hall's failure to provide any explanation as to how he

24 ⁷ In his supplement (#280), Hall for the first time argues that a video
25 of the August 22, 2006, transaction exists. As with the audio recording,
26 he does not provide the court with a copy of the supposed video and does not
27 otherwise explain how he procured it, how it was made, or how it would have
28 affected the jury's verdict. In addition, the government did produce a
video recording of Hall, Calhoun, and the CI on August 22, 2006, before they
entered 725 Wardelle. (Trial Tr. 78-80, 87, Ex. 8). There is no reason to
believe the video in Hall's possession is anything other than this
recording.

1 came across such a recording renders his assertion of its existence
2 palpably incredible.

3 3. Hats

4 Hall argues that Ciciliano should have inspected and had
5 tested for DNA the hats found in apartment 3201. He argues that if
6 he had done so, Ciciliano would have learned the hats had someone
7 else's name and DNA. Hall argues that Gorup falsely testified that
8 the hats belonged to Hall.

9 While it is possible that had Ciciliano looked into the
10 physical evidence recovered from apartment 3201 he could have
11 argued that some of the objects were not Hall's, the court finds
12 that any failure to do so did not prejudice Hall's defense. The
13 hats were circumstantial evidence that Hall had access to the
14 apartment. There was, in addition to that, an overwhelming amount
15 of direct evidence, including Calhoun's identification of Hall as
16 the person who sold him cocaine on August 22, 2006, and who
17 accepted money in the amount agreed to buy three ounces of cocaine
18 on August 15, 2006, Gorup's identification of Hall as a person who
19 came and went from apartment 3201 several times in the days before
20 he was arrested, and \$220 of cash Calhoun used to purchase cocaine
21 from Hall found in the apartment. In light of this evidence, there
22 is no reasonable probability that an argument that the hats did not
23 belong to Hall would have affected the verdict. Further, Ciciliano
24 did not perform deficiently. In fact, he did raise questions
25 during his cross examination of Gorup as to whether the hats
26 actually belonged to Hall. (Trial Tr. 206-210).

27 Further, the court notes that Gorup never claimed the hats
28 belonged to Hall. Rather, he testified only that they found hats

1 that looked like the hat Hall had been observed wearing. There was
2 therefore no reason to focus on proving the ownership of the hats.

3 4. Compton Court Record

4 Hall argues that Ciciliano should have found and relied on a
5 court record from Compton that would have proven Hall was not in
6 apartment 3201 when Gorup testified he was. (Def. Mot. 30-31
7 (App'x 10)). Ciciliano was not ineffective for failing to rely on
8 this document. The record Hall cites is file dated August 21,
9 2006. At most, this proves Hall filed the document in Compton
10 sometime on August 21, 2006. However, there was no testimony at
11 trial placing Hall in Las Vegas on August 21, 2006.⁸ Rather, Gorup
12 testified that he saw Hall in apartment 3201 on August 18, 2006,
13 and then again on August 22, 2006. Given the relatively short
14 distance between Compton, California, and Las Vegas, Nevada, Hall's
15 apparent presence in Compton at some point on August 21, 2006, does
16 not make it impossible for him to have been in Las Vegas - and
17 particularly in apartment 3201 - on the dates Gorup asserted.

18 5. Receipt

19 Hall argues that Ciciliano should have found a receipt with
20 defendant's signature dated August 18, 2006, from a Diesel Truck
21 repair shop in California. Hall does not, however, provide any
22 such receipt, nor has he established that Ciciliano would have been
23 able to locate this receipt. Further, without more, such a receipt
24 would not have contradicted Gorup's statement. Gorup placed Hall
25 inside apartment 3201 on August 18, 2006, but he did not testify as
26 to what time of day. (Trial Tr. 172). Even if Hall had been at a

27
28 ⁸ While Gorup testified before the grand jury that he observed Hall in
apartment 3201 on August 21, 2006, that testimony was not before the jury.

1 truck repair store in California on August 18, 2006, it is not
2 impossible for him to have been at apartment 3201 either before or
3 after that time. Accordingly, Ciciliano was not ineffective for
4 failing to find a receipt that Hall has not established exists.
5 Even if the receipt did exist and could have been located by
6 Ciciliano, there is no reasonable probability that its use at trial
7 would have changed the result.

8 G. "Pussylips"⁹

9 Hall argues that during his closing argument, Ciciliano
10 referred to the nickname "Pussylips," heard on some of the recorded
11 conversations. Hall argues that the term had been redacted from
12 both the audio recordings and transcript so Ciciliano's use of it
13 "confused" and "insulted" the jury and made Ciciliano seem like he
14 had "lost his mind." (Def. Mot. 33).

15 While the record reflects that the term Pussylips was redacted
16 from the transcript of the recording, Hall is incorrect when he
17 argues that it was never heard by the jury. In fact, Pussylips is
18 one of the first words - and one of the last words - on the audio
19 recording introduced as Exhibit 4-A at trial. Accordingly,
20 Ciciliano was not ineffective for referencing and relying on the
21 term during his closing argument.

22 H. Failure to Secure "Aiding and Abetting" Instruction

23 Hall argues that Ciciliano should have argued for an aiding
24 and abetting instruction after the jury sent a note asking about

25
26 ⁹ Hall's petition challenges Ciciliano's failure to object to "the
27 government's witnesses regarding the identification of the person the
informant was talking to on the phone." However, Hall discusses only
28 Ciciliano's use of the term "Pussylips" and does not explain why the
government witnesses' identification of his voice on the audio recordings
was unreliable or erroneous.

1 facilitation. After receiving the note, the court discussed the
2 issue with counsel, and pondered whether the jury was asking about
3 aiding and abetting. Ultimately, the court determined an aiding
4 and abetting instruction would not be appropriate because no
5 evidence supported such an instruction. An objection by Ciciliano
6 would not have changed this result. Further, a defendant found
7 guilty of aiding and abetting is punishable as a principal. 18
8 U.S.C. § 2. Therefore, not only did the absence of an aiding and
9 abetting instruction not prejudice Hall's case, such an instruction
10 could itself have been prejudicial as it would have given the jury
11 an additional basis (and not a lesser-included basis) on which to
12 find Hall guilty.

13 I. Proposed Plea Agreement

14 Before trial, the government offered Hall a plea agreement.
15 Under the agreement, Hall would have pleaded guilty to Count III of
16 the indictment and would have received an adjustment for acceptance
17 of responsibility. In return, the government would not have
18 pursued a mandatory term of life imprisonment under 21 U.S.C.
19 §§ 841 and 851. (See Doc. #281). While Hall admits he was aware of
20 the government plea offer, and admits that Ciciliano advised him to
21 take it, he asserts that Ciciliano never explained the offer to him
22 and did not allow Hall to read it himself. Hall asserts that the
23 first he heard of the offer was the day before trial when Ciciliano
24 called him on the phone and told him the government was offering
25 between 15 and 18 years. Hall asserts that when he began asking
26 questions about the offer, such as whether the court could still
27 sentence him to life, Ciciliano got angry and refused to discuss
28 the matter further. Finally, Hall argues that Ciciliano never

1 informed him that he could face a life sentence if he went to
2 trial, and that Ciciliano instead told him that the maximum he
3 would face after trial would be thirty years.

4 Ciciliano asserts that he repeatedly advised Hall to take the
5 plea offer. (Doc. #257 (Ciciliano Aff. ¶¶ 6, 10)). He asserts
6 that when he so advised Hall the day before trial, Hall "insisted
7 that he was 'done taking deals' and that he wished for his case to
8 proceed to trial." (*Id.* ¶ 10). Ciciliano also denies Hall's
9 assertion that he was never provided a copy of the plea agreement;
10 Ciciliano avers that he provided Hall a copy of the agreement the
11 first time they met and that they discussed the agreement in
12 detail. (Doc. #275 (Ciciliano Aff. ¶ 5)). He asserts that "[t]he
13 potential of the plea offer was regularly discussed in my office's
14 meetings with" Hall and that Hall "was emphatic that he would not
15 accept a plea offer." (*Id.* ¶ 6). Finally, Ciciliano asserts that
16 he informed Hall "on numerous occasions of the potential for a life
17 sentence." (Doc. #281 (Ciciliano Aff. ¶ 3); Doc. #284 (Ciciliano
18 Aff.)).

19 Hall admits that he said he was "done taking deals" (see Doc
20 #264 (Def. Reply 24 & 59)), but insists that what he really meant
21 was that he would not sign something he had not read and did not
22 understand. Hall asserts that if the plea agreement had been
23 explained to him, he would have taken it.

24 Ineffective assistance of counsel claims may be based on
25 alleged deficiencies during the plea bargaining stage. See *Missouri*
26 v. *Frye*, - U.S. - , 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, -
27 U.S. -, 132 S. Ct. 1376 (2012). Here, however, Hall has not
28 demonstrated ineffective assistance of counsel at the plea

1 bargaining stage. There is no dispute that Hall told Ciciliano
2 that he was "done taking deals." There is likewise no dispute that
3 Hall was aware of the nature of the offer: 15-18 years with an
4 agreement to not pursue a mandatory life sentence under § 851. (See
5 #264 (Def. Reply 60, 63); *id.* (Hall Decl. ¶ 12)).¹⁰ While Hall
6 asserts that he did not mean to say he would not take any deals, it
7 was his words, and not what he may have intended by them, that
8 measure whether Ciciliano's reaction to them fell below the
9 standard of reasonable representation. Hall was aware of the
10 offer, he was aware that it contained an offer of less time than he
11 faced if he went to trial, and he advised his attorney that he was
12 "done taking deals."

13 In addition, the court finds Hall's contention that he did not
14 know he was facing a life sentence if he went to trial is
15 meritless. Hall's affidavit makes clear he knew he was facing a
16 life sentence. (Doc. #264 (Def. Reply Def. Aff. ¶ 12)).

17 Accordingly, the court concludes that Ciciliano did not render
18 ineffective assistance of counsel in connection with the
19 government's proposed plea agreement to Hall.

20 **II. Other Arguments**

21 All of Hall's remaining arguments are without merit.

22 Further, Hall raises several new arguments in his reply, which
23 with the exception discussed above, the court declines to consider.

24 See *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The

25
26 ¹⁰The court notes that Hall made these admissions in his reply, which
27 was filed with the court on February 25, 2013. According to Hall's later
28 filings, the first time he saw the proposed plea agreement was sometime
after that date, as he claimed on June 14, 2013, that the government had not
yet served him with a copy of the agreement.

1 district court need not consider arguments raised for the first
2 time in a reply brief.”).

3 Finally, the court declines to conduct an evidentiary hearing
4 on any of Hall’s claims as those claims “viewed against the record,
5 either do not state a claim for relief or are so palpably
6 incredible or patently frivolous as to warrant summary dismissal.”
7 *United States v. Burrows*, 872 F.2d 915, 197 (9th Cir. 1989).

8 **III. Certificate of Appealability**

9 The standard for issuance of a certificate of appealability
10 calls for a “substantial showing of the denial of a constitutional
11 right.” 28 U.S.C. § 2253(c). The Supreme Court has interpreted 28
12 U.S.C. § 2253(c) as follows:

13 Where a district court has rejected the
14 constitutional claims on the merits, the
15 showing required to satisfy §2253(c) is
16 straightforward: The petitioner must
17 demonstrate that reasonable jurists would find
18 the district court’s assessment of the
19 constitutional claims debatable or wrong. The
20 issue becomes somewhat more complicated where,
21 as here, the district court dismisses the
22 petition based on procedural grounds. We hold
23 as follows: When the district court denies a
habeas petition on procedural grounds without
reaching the prisoner’s underlying
constitutional claim, a COA should issue when
the prisoner shows, at least, that jurists of
reason would find it debatable whether the
petition states a valid claim of the denial of
a constitutional right and that jurists of
reason would find it debatable whether the
district court was correct in its procedural
ruling.

24 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v.*
25 *Giles*, 221 F.3d 1074, 1077-79 (9th Cir. 2000). The Supreme Court
26 further illuminated the standard for issuance of a certificate of
27 appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The
28 Court stated in that case:

We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

¹⁰ Miller-El, 537 U.S. at 338 (quoting *Slack*, 529 U.S. at 484).

10 The court has considered the issues raised by Hall, with
11 respect to whether they satisfy the standard for issuance of a
12 certificate of appeal, and determines that none meet that standard.
13 The court therefore denies Hall a certificate of appealability.

Conclusion

In accordance with the foregoing, Hall's motion pursuant to 28 U.S.C. § 2255 (#237) is **DENIED**. To the extent the court did not in this order discuss any particular assertion made by Hall in his petition, the court finds those contentions to be without merit. Hall's motion for an evidentiary hearing (#265) is **DENIED**. Because the court has previously considered and granted in part Hall's motion for discovery, and allowed supplementation to the petition thereafter, Hall's motion to hold this matter in abeyance pending receipt of original discovery (#264) is **DENIED AS MOOT**.

IT IS SO ORDERED.

DATED: This 3rd day of January, 2014.

Howard D McKibben

UNITED STATES DISTRICT JUDGE